In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1255.

FRANCIS A. VITELLO,
PETITIONER,

v.

CHARLES GAUGHAN, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTION, BRIDGEWATER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of the Respondent in Opposition.

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Respondent is not dissatisfied with petitioner's citation of opinions below or his statement of jurisdiction.

Questions Presented.

1. Whether a state prisoner, who has had an opportunity fully to litigate in the state court his claim that evidence derived from electronic surveillance which was admitted at trial was obtained in violation of the Fourth Amendment to the United States Constitution, is entitled to further collateral review of that claim by way of a petition for writ of habeas corpus?

2. Whether an alleged violation of 18 U.S.C. § 2518 presents sufficient grounds for relief pursuant to 28 U.S.C. § 2254, under the rule of *Davis* v. *United States*, 417 U.S. 333 (1974)?

3. Whether the inadvertent omission of a termination date in a court order authorizing electronic surveillance constitutes error requiring the grant of a writ of habeas corpus?[1]

Statement of the Case.

This is a petition for writ of certiorari to the United States Court of Appeals for the First Circuit.

[1] In the statement of issues presented No. 5 (Petition, p. 3), the impression is created that evidence was intercepted as a result of the operation of the wiretap for a period greater than that legally permissible. The opposite is correct. The operation of the wiretap was concluded in 12 days, while the legally permissible period, and the period requested in the application, was 15 days.

Petitioner, for the first time, appears to argue that the alleged error concerns the failure to establish that a certain period, no more than 15 days, was "necessary" (Petition, pp. 5-7, 9, 31). This argument was never presented to the courts below and is therefore not properly before this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970).

A. Prior Proceedings.

The petitioner and several others were convicted, after a trial by jury, in the Superior Court of the Commonwealth of Massachusetts on indictments charging violations of various gaming laws. The convictions were affirmed by the Supreme Judicial Court of the Commonwealth. *Commonwealth* v. *Vitello*, Mass. Adv. Sh. (1975) 769, 327 N.E. 2d 819.[2]

The petitioner then filed a petition for writ of habeas corpus in the Federal District Court for the District of Massachusetts.

On April 9, 1976, the District Court ordered that the "writ of habeas corpus shall issue" (Petition, A. 9a).

Respondent appealed to the Court of Appeals for the First Circuit. On November 8, 1976, the court vacated the order of the District Court and remanded the cause with directions to dismiss the petition (Petition, A. 4a).

B. Statement Of Facts.

In the course of an investigation into organized gaming activities, the District Attorney's Office applied for and

[2] The Supreme Judicial Court, relying upon its prior decision in *Commonwealth* v. *Todisco*, 363 Mass. 445 (1973), held that the application in support of the warrant could, according to Massachusetts law, be read together with the warrant and, so read, the duration of court-ordered interception was properly limited. The Supreme Judicial Court's approach is consistent with the reasoning of the federal courts. *United States* v. *Tortorello*, 480 F. 2d 764 (2d Cir. 1973); *United States* v. *Manfredi*, 488 F. 2d 588 (2d Cir. 1973); *United States* v. *Cirillo*, 499 F. 2d 872 (2d Cir. 1974); *United States* v. *Poeta*, 455 F. 2d 117 (2d Cir. 1972). But see *Moore* v. *United States*, 461 F. 2d 1236 (D.C. Cir. 1972).

received two court orders authorizing electronic surveillance pursuant to Mass. Gen. Laws, c. 272, § 99. On April 24, 1972, an order authorizing electronic surveillance, based upon the application of a specially designated Assistant District Attorney and the affidavit of Officer John C. O'Malley, issued (App. A, pp. 1a-3a, *infra*). On May 10, 1972, upon application and affidavit of the same parties (App. B, pp. 4a-17a, *infra*), a second order authorizing electronic surveillance was issued by the same judge of the Superior Court of Massachusetts (App. C, pp. 18a-20a, *infra*). The application for the order issued on May 10, 1972, contained the following language:

> "(11) That the interception is required to be maintained for a period of 15 calendar days, commencing on the date of installation of the intercepting device, and that the hours of each day during which wire communications may be reasonably expected to occur are those between the hours of 11:00 a.m. to 7:30 p.m." (App. B, pp. 8a-9a, *infra*.)[3]

The warrant authorizing the interception signed on May 10, 1972, did not include this provision.[4]

On the motion to suppress prior to the state court trial, the Assistant District Attorney, who had made application for the warrant, testified that he had intended to apply only for a 15-day interception but that through typographical

[3] An identical provision appeared in the April 24, 1972, application and in the warrant issued on April 24, 1972, authorizing electronic surveillance contained similar words of limitation on the period for which interception was authorized.

[4] Contrary to petitioner's assertion (Petition, p. 8), the proposed May 10 order did not contain "blanks" susceptible of being filled in by the court (App. C). Rather, the entire section relating to time limits was omitted.

error and a failure to proofread accurately, the provision limiting the period of interception was omitted from the proposed copy of the order. The trial court found, and the Supreme Judicial Court agreed, that: "By error and inadvertence, the lines in the warrant relating to the time limitations . . . [were] not typed in by the typist. . . ." *Commonwealth* v. *Vitello*, *supra*, 327 N.E. 2d at 846. The interception was concluded in 12 days. *Vitello* v. *Gaughan*, 544 F. 2d 17, 18 (1st Cir. 1976).

Reasons For Not Granting The Writ.

I. The Court of Appeals Properly Applied Stone v. Powell, ____ U.S. ____, 96 S. Ct. 3037 (1976), To the Instant Case.

Petitioner's claim under the Fourth Amendment is not cognizable upon a petition for writ of habeas corpus. *Stone* v. *Powell*, ____ U.S. ____, 96 S. Ct. 3037 (1976).

Stone bars relief regardless of whether oral statements or tangible items are the subject of the seizure complained of. In fact, it would appear that physical entry is the area of primary protection. *United States* v. *United States District Court of Michigan*, 407 U.S. 297 (1972). Petitioner's assertion that *Stone* does not bar raising a claim based upon the exclusionary rule as enunciated by Congress in 18 U.S.C. §§ 2510-2520 misapprehends the import of the *Stone* decision in two important respects.

First, in *Stone* the Court did not diminish the scope or effect of the exclusionary rule itself, but addressed itself to the scope of habeas corpus and to the issues cognizable thereupon. Clearly, the Court has historically had the

power to alter the scope of the writ. *Brown* v. *Allen*, 344 U.S. 443 (1953); *Fay* v. *Noia*, 372 U.S. 391 (1963); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Francis* v. *Henderson*, 425 U.S. 536 (1976).

Second, while *Stone* involved an exclusionary rule judicially created to effectuate rights secured by the Fourth Amendment, *Stone* at 3046, the rule embodied in 18 U.S.C. §§ 2515 and 2518(10)(a) is no more than a Congressional endorsement or codification of that judicially fashioned exclusionary rule. The legislative history of 18 U.S.C. §§ 2510-2520 demonstrates that the legislation was enacted in response to *Berger* v. *New York*, 388 U.S. 41 (1967):

> "Title III was drafted to meet these [*Berger*] standards and conform with *Katz* v. *United States*, 88 S. Ct. 507, 389 U.S. 347 (1967)." Senate Report No. 1097, U.S. Code Cong. & Adm. News (1968), at 2153.

Therefore, respondent suggests there is no difference, in either purpose, scope or effect, between the exclusionary rule enacted by Congress and that which was judicially created. Therefore, the same considerations which preclude the grant of federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial, operate to foreclose collateral review in the context of the instant case. These considerations include:

> "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine

> of federalism is founded." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

Balancing these societal and judicial interests against those of petitioner, who makes no claim to innocence and who suffered no prejudice as a result of the inadvertent defect in the warrant, requires, respondent suggests, the same result in this case as reached in *Stone* v. *Powell*, *supra*.

The Court of Appeals did not err in applying *Stone* to the instant case. Moreover, application of *Stone* to a case in which the District Court's consideration of the Fourth Amendment claim predated that decision is consistent with the effect accorded by other circuits. *Bracco* v. *Reed*, 540 F. 2d 1019 (9th Cir. 1976); *Roach* v. *Parratt*, 541 F. 2d 772 (8th Cir. 1976); *Chavez* v. *Rodriguez*, 540 F. 2d 500 (10th Cir. 1976).

II. Collateral Relief Is Not Available For Petitioner's Title III Claim.

A. *Davis v. United States, 417 U.S. 333 (1974), Is Applicable To A Proceeding Brought Under 28 U.S.C. § 2254.*

Davis v. *United States*, 417 U.S. 333 (1972), formulated the test for determining when an error of law, not of constitutional dimension, may be raised on collateral attack.

The impact of the *Davis* decision is not limited to proceedings under 28 U.S.C. § 2255. Although the *Davis* opinion did not specifically state its applicability to § 2254 proceedings, it is apparent from its language and its histori-

cal references that its holding applies not only to § 2255, but also to proceedings for state prisoners under § 2254.

The Court stated, ". . . there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254," and ". . . the unambiguous legislative history show[s] that § 2255 was intended to mirror § 2254 in operative effect." *Davis*, *supra*, 417 U.S. at 344.[5]

Since federal habeas corpus and § 2255 are equivalent "in operative effect," it follows that the test for determining when an error of law may receive collateral review is equally applicable to both proceedings.

B. *Petitioner's Claim Of Error Does Not Merit Collateral Review Under The Davis Test.*

Not "every asserted error of law can be raised" on collateral attack. The inquiry to be made of a petition attacking a sentence on the basis of a non-constitutional error of law is,

> "whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" *Davis*, *supra*, at 346.

[5] There is no indication in *Davis*, or in any other opinion, that § 2255 grounds for relief are less extensive than habeas corpus grounds, as petitioner appears to argue in his brief at p. 26. The grounds for review of claims of federal prisoners and of state prisoners in collateral proceedings are identical, except that a § 2255 court need not be concerned with the adequacy of the Federal Rules of Criminal Procedure. *Kaufman* v. *United States*, 394 U.S. 217 (1969). See generally, Roberts, *Davis* v. *United States*: *Intervening Change In Law As A Non-Constitutional Ground For Federal Collateral Relief*, 7 Colum. Human Rights L. Rev. 389 (Spring-Summer, 1975).

Thus, "th[is] Court stressed that the magnitude of any claimed error was also a threshold consideration." *McRae* v. *United States*, 540 F. 2d 943, 945 (8th Cir. 1976).[6]

While *Davis* for the first time held that an error of federal law not of a constitutional dimension is cognizable on collateral attack, it did not establish a new standard for judging collateral attacks. "It merely applied the constitutional standard already applicable to procedural due process questions to substantive matters not protected by the Constitution." *Bachner* v. *United States*, 517 F. 2d 589, 599 (7th Cir. 1975). That was the standard applied in *Hill* v. *United States*, 368 U.S. 424 (1962), from which the *Davis* test is fashioned.

In *Hill*, the petitioner claimed that he was entitled to collateral relief because of the District Court's failure to permit him to speak in his own behalf, contrary to Rule 32(a) of the Federal Rules of Criminal Procedure. In denying relief, the Court said that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." *Hill*, *supra*, 368 U.S. at 429.

[6] Neither Title III nor any other "law" automatically determines that its violation is an "exceptional circumstance" entitling a petitioner to collateral review. See *United States ex rel. Machi* v. *United States Department of Prob. and Par.*, 536 F. 2d 179 (7th Cir. 1976). Respondent does not assert that a claim of a "fundamental defect" under Title III would never present "exceptional circumstances" meriting collateral relief, and therefore finds no conflict between the decision in this case and the opinions cited in petitioner's brief at p. 28.

Mr. Justice Stewart contrasted a "technical error" which results in no prejudice to a defendant with the alleged error in *Davis* which results in "conviction and punishment . . . for an act that the law does not make criminal," an error bearing on the petitioner's guilt or innocence. *Davis*, *supra*, 417 U.S. at 346.

The technical error in the wiretap warrant is clearly not a "fundamental defect" which resulted "in a complete miscarriage of justice." Indeed, the error claimed by petitioner does not even rise to the level of the alleged error in *Hill*. The time limitations, inadvertently omitted from the warrant, were strictly complied with, and the petitioner was in no way prejudiced by the error. Furthermore, there is no question here of the error bearing on the petitioner's guilt or innocence.

Moreover, it is only when there are "exceptional circumstances" that even a "fundamental defect" results in the right to collateral review. The origins of this requirement demonstrate that it has demanded specific circumstances for satisfaction. "Those are (1) when the error was not correctible on appeal, or (2) when there are exceptional circumstances excusing the failure to appeal."[7]

As further illustrated by *Davis*, on those occasions where a "flagrant error"[8] has survived direct appeal and there is no other remedy available for its correction, collateral relief is available for correction of the "fundamental defect."

[7] See 7 Colum. Human Rights L. Rev., *supra*, at 399-400, for a review of cases which constitute "exceptional circumstances": those where resort to remaining available remedies would be futile, *Layton* v. *Carson*, 479 F. 2d 1275 (5th Cir. 1973), or where pursuit of remaining remedies would result only in "repetitious applications," *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971), or where an "erroneous doctrine" upon which the court acted required prompt correction, *Ex parte Hudgings*, 249 U.S. 378 (1919), or where a conflict of state and federal authorities over an important question of jurisdiction needed resolution, *Bowen* v. *Johnston*, 306 U.S. 19 (1939).

[8] *Sunal* v. *Large*, 332 U.S. 174, 179 (1947).

This case presents no "exceptional circumstances" that justify collateral relief under § 2254. Petitioner availed highest court of the Commonwealth and had the opportunity to seek direct review in the United States Supreme Court through application for a writ of certiorari.

Therefore, petitioner's Title III claim, based on an inadvertent stenographic mistake which resulted in the time limit for electronic surveillance being omitted from the face of the warrant, clearly does not rise to the magnitude of a "flagrant error" or "fundamental defect" entitling him to release.

III. The Error Complained Of In The Instant Case Is Not Of Such Magnitude As To Require Relief On A Petition For A Writ Of Habeas Corpus.

Respondent suggests that the First Circuit Court of Appeals did not err in requiring that prejudice be demonstrated before release would be granted. Petitioner, however, appears to argue that any type of noncompliance with 18 U.S.C. § 2518 requires suppression. This Court has eschewed such a per se approach. In *United States* v. *Chavez*, 416 U.S. 562, 574 (1974) (inadvertent misidentification of Assistant Attorney General authorizing the wiretap application), this Court recognized that not every violation of Title III resulted in an unlawful interception. Consistently, the various Circuit Courts of Appeals have considered whether a requirement was deliberately ignored and whether any tactical advantage was gained. In the absence of such a finding, the alleged error has been held not to require suppression. *United States* v. *Civella*, 533 F. 2d 1395 (8th Cir. 1976), *cert. denied*, 20 Cr. L. 4170 (1977);

United States v. *Doolittle*, 518 F. 2d 500 (5th Cir. 1975), *cert. denied*, 20 Cr. L. 4199 (1977). Therefore, respondent submits that, even were petitioner's claim deemed to be proper for consideration pursuant to a petition for writ of habeas corpus, suppression under federal law was not required because the omission was inadvertent, the surveillance was concluded within 12 days (thus satisfying the purpose underlying the enactment of § 2518(4)(e)), there was no allegation of bad faith on the part of the government and no advantage to the Commonwealth or prejudice to the defendant resulted from the inadvertent omission and, of course, petitioner makes no claim of innocence.

Conclusion.

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT AGENTS:

GREETING:

Whereas, application in writing under oath, supported by affidavits, has this day been made before me, the subscriber, a Justice of the Massachusetts Superior Court, complaining that Ralph "Fred" Vitello, further described as a white male, 50 years old, about five feet eight inches tall, now residing at 165 Hackensack Road, West Roxbury and using telephone #327-5527 at S-2 102 Cass Street, West Roxbury and other diverse individuals named in the attached affidavits and person or persons unknown, have conducted, are conducting and will continue to conduct from said apartment, 102 Cass Street, West Roxbury section of the City of Boston, Massachusetts, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization, to engage in supplying illegal goods and services, namely, violations of Section 17 of G.L. Chapter 271, contrary to the laws of this Commonwealth, and that they communicate by means of the telephone between and among themselves in furtherance of such conspiracy, that these communications are made by Ralph "Fred" Vitello, and diverse individuals named in the attached affidavits and

amongst and between any or all of them, and any other person or persons unknown concerning unlawful gaming by means of a telephone instrument located on the above described premises at 102 Cass Street, and that said instrument is of this date, numbered as 327-5527 and listed to James M. Vitello as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said Ralph "Fred" Vitello and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful gaming and violations of Section 17 of G.L. Chapter 271.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, General Laws, as amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of James M. Vitello, located in Suite 2 at 102 Cass Street, West Roxbury section of the Boston, Massachusetts, and to tap and make connection with any and all wires leading to the telephone instrument as of this date numbered 327-5527, with a purpose to obtain evidence of the unlawful activities of Ralph "Fred" Vitello, James M. Vitello, other persons as described in the affidavit submitted with said application and a person or persons unknown at this time concerning unlawful gaming and violations of Section 17, G.L. Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such interception procedure be employed for a period not exceeding 15 days, from 11:00 a.m. to 7:30 p.m. within the 30-days next following the date of the installation of the intercepting device pursuant thereto, and without limita-

tions of automatic termination because the application alleges, and it is found as a fact that circumstances of exigency do exist, and the same exigency permits and requires postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

WITNESS, my hand and seal on this day of issuance, the 24th day of April, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.

Appendix B.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT.

Application of Robert Snider, Assistant District Attorney, Suffolk District, for a Wiretap Warrant.

I, ROBERT SNIDER, specially designated Assistant District Attorney of the Suffolk District, being duly sworn, state:

(1) That I am a duly appointed and sworn Assistant District Attorney of the Suffolk District within the meaning of Mass. General Laws, Chapter 272, Section 99.

(2) That I have been specially designated by District Attorney GARRETT H. BYRNE, to make application exparte to a Judge of competent jurisdiction for a warrant or warrants or renewals thereof to intercept wire or oral communications running to and from the telephone lines servicing the telephones numbered 323-1012 and 327-5892; both being located in 28 Meyer Street, Roslindale, Mass.; and that a true copy of a letter of District Attorney BYRNE is attached to this Application and marked "A".

(3) GARRETT H. BYRNE is the duly elected District Attorney of the Suffolk District.

(4) That upon my information and belief, and the facts as alleged in Affidavits presented herewith, there is probable cause to believe that a highly organized and continuing conspiracy exists in Suffolk County and especially in the West Roxbury-Roslindale area to supply illegal goods and services, to wit: to violate Section 17 of Chapter 271 of the Mass. General Laws; that the person or persons who control and organized said conspiracy and reap its profits

have insulated himself or themselves from apprehension and prosecution by using others.

(a) On April 24, 1972, I appeared before REUBEN L. LURIE, Judge of the Massachusetts Superior Court, Suffolk County, a Judge of competent jurisdiction pursuant to Mass. General Laws, Chapter 272, Section 99(B(9)) and (F(1)) and submitted an Application for a Wiretap Warrant to intercept wire or oral communications running to and from the telephone numbered 327-5527, located in Suite 2 at 102 Cass Street, West Roxbury, a copy of which is attached hereto and marked "B", together with the Affidavit of JOHN C. O'MALLEY, Detective, Boston Police Department (a copy of which is attached hereto and marked "C"). On the same day, April 24, 1972, a Warrant was issued authorizing and directing that wire and oral communications over said telephone be intercepted for a period not exceeding 15 days, from 11:00 a.m. to 7:30 p.m. within the 30 days next following the date of the installation of the intercepting device. A copy of said Warrant is attached hereto and marked "D". The intercepting device was installed and commenced interceptions and recording of communications at 11:00 a.m. on April 25, 1972. It is respectfully requested that all the allegations, information, beliefs, facts and inferences and opinions drawn therefrom contained within said Application marked "B" and in said Affidavit marked "C" be considered a part of this Application and, by reference, made a part hereof because there is probable cause to believe that said telephones 323-1012 and 327-5892 are part of the same conspiracy described therein, but are higher in the hierarchy of the organization of said conspiracy.

(b) That the recorded communications intercepted pursuant to said Warrant marked "D" indicate that "MILLY" and "MARY", two females at 28 Meyer Street using tele-

phones 323-1012 and 327-5892, are working with FRED VITELLO for FRANK VITELLO; that MILLY takes Number Play. She is also in contact with the wire service which provides her with the daily number and with Racing results which she relays to FRED VITELLO and probably others, a service necessary to the maintenance of this conspiracy and to its operation. All of said activities being violations of Mass. General Laws, Chapter 271, Section 17 or constituting conspiracy to violate the same and that the person or persons; such as FRANK VITELLO and those who operate the wire service and who control and organize said conspiracy or conspiracies and reap its profits have insulated themselves from apprehension and prosecution by using others and by conducting much or all of their illegal activities over the telephone.

(5) The source of my information and belief is the facts related to me by Officer JOHN C. O'MALLEY, affiant of the attached Affidavits, who is well known to me as a Boston Police Officer attached to the Suffolk District Attorney's Office and the other Officers identified in said Affidavit.

(6) Based upon the facts contained in said Affidavits and the reasonable inferences that may be drawn from them by Officers who have had, as detailed in said Affidavits, years of experience in investigating violations of Section 17, Mass. General Laws, Chapter 271, there is probable cause to believe that wire communications of "MARY" and "MILLY", a better description of them being unknown to us at this time, but who have spent their time approximately between 11:30 a.m. to 6:30 p.m. every working day at 28 Meyer Street, Roslindale using at least two phones at said 28 Meyer Street according to the records of the New England Telephone Company, listed to WILLIAM P. WEST of said address, numbered 323-1012 and 327-5892, will not only constitute evidence of the fact that a designated offense has

been, is being and will continue to be committed but that information will be obtained which will aid in the apprehension of a person or persons who I have probable cause to believe has committed, is committing and will continue to organize and control violations of Section 17, Mass. General Laws, Chapter 271.

(7) That the wire communications of said MILLY and MARY will occur at 28 Meyer Street, Roslindale section of the City of Boston, Suffolk County, being a residence and described further as a 2-½ story, wood frame dwelling with green aluminum siding, and will occur on the telephones numbered 323-1012 and 327-5892.

(8) The nature of the wire communications sought to be intercepted and overheard is communication necessary to and adapted for, the conduct of Gaming and conspiracy to commit such Gaming in violation of Section 17 of Mass. General Laws, Chapter 271; such as:

(a) The keeping of a building or a room, or any part thereof, or occupying such a building, room, or any part thereof with apparatus, books and devices for registering bets and buying and selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election.

(b) The act of registering such bets and buying and selling such pools and being concerned in buying and selling the same.

(c) The knowing, keeping, exhibiting, using or employing a device or devices or apparatus for registering such bets or for buying or selling the same and the knowing permitting of the aforementioned violations.

(d) The acts or act of conspiring to commit the unlawful acts described in (a), (b), and (c) of this paragraph, and:

(e) That the nature of said wire communications sought to be intercepted and overheard have been and will continue to be communications indicating violations of other closely related Sections of Mass. General Laws, Chapter 271, besides Section 17; such as Section 17A, which provides a penalty for using a telephone or permitting a telephone subscribed for to be used for the purpose of accepting wagers or bets and for other Gaming violations.

(9) That normal investigative procedures have been tried; such as surveillance and the questioning of informers have been tried and have failed and, due to the organized nature of said conspiracy, the evasive tactics used by its members, the secretiveness of its members, the number of participants involved and the care with which each member takes to conceal his actions, normal investigative procedures appear reasonably unlikely to succeed. The apparatus used to register bets, usually notations on slips of paper, are easily and quickly burned, disposed of, or concealed so that Officers searching pursuant to Search Warrants will, in all probability, not be able to find or seize them. Moreover, the principal means of committing the said designated offenses and conspiracy to commit them are spoken words over the telephone which may, of course, be intercepted and overheard only in compliance with Section 99 of Mass. General Laws, Chapter 272.

(10) The wire communications sought are material to the investigation and intended prosecution of MARY, MILLY, JAMES VITELLO, RALPH "FRED" VITELLO, TANZI, JOHN DOE, FRANK VITELLO, the operators of the Wire Service and divers other persons, and that such communications are not legally privileged.

(11) That the interception is required to be maintained for a period of 15 calendar days, commencing on the date of installation of the intercepting device, and that the

hours of each day during which wire communications may be reasonably expected to occur are those between the hours of 11:00 a.m. to 7:30 p.m.

(12) That the nature of this investigation is such that the authorization for the interception should not automatically terminate when the described oral or wire communications are first obtained; that the Affidavit attached hereto specifically states facts establishing probable cause to believe that additional wire communications will be obtained; that those facts and the inferences that may be drawn from them indicate that the said illegal Gaming and the conspiracy to commit the same are continuing and extensive, well-organized and comprises the primary means of livelihood of many of the persons described in said Affidavit.

(13) That no other prior application has been submitted or warrant previously obtained for interception of oral or wire communications for said telephones numbered 323-1012 or 327-5892 at 28 Meyer Street.

(14) That there is good cause for requiring the postponement of service pursuant to Paragraph 1, Subparagraph 2 of Section 99 of Mass. General Laws, Chapter 272 in that the following exigent circumstances and important special facts exist: "MARY" and "MILLY" whose wire communications are sought to be intercepted, are employees, associates, possible relatives, companions and co-conspirators of divers other persons, some as described in the Affidavit and others now unknown to this Applicant, whose acts and communications are or may soon be under investigation and who may become the subjects of later applications pursuant to said Section 99, Mass. General Laws, Chapter 272. If either or both MARY or MILLY are given notice within thirty days of the expiration of the interceptions, there is great danger that other investigations will be jeopardized and

Law Enforcement will be unable to pierce the layers of insulation and break down the wall of secrecy with which organized crime has protected itself. It is submitted by the Applicant that the apprehension and successful prosecution of the low level workers of Organized Crime has not been and is not successful in eliminating Organized Crime. Only the apprehension and successful prosecution of the organizers and controllers of the organization, and of necessary illegal support of such as the Wire Service will serve to eliminate Organized Crime. Secrecy is essential to the identification and apprehension of these persons.

WHEREFORE, the Commonwealth asks that this Court order and direct that an attested copy of any warrant issuing upon this application be served upon said MARY or MILLY, or any other persons as required by said Section 99 only when this and related investigations have been completed but in no event later than three (3) years from the time of expiration of the warrant or the last renewal thereof, whichever shall occur first.

(15) The neighborhood in the vicinity of 28 Meyers Street is residential, consisting mostly of persons who have been there for some time. It is extremely unlikely, probably impossible, to find a location at which to install an interception in the vicinity of 28 Meyers Street itself. Given the nature of the neighborhood and the caution displayed by the persons under surveillance, our activity would be spotted. A location has been secured, however, in the same exchange so that it will not be necessary to make a secret entry upon a private place and premises in order to install an intercepting device or recording equipment and the point from which to install the intercepts on said two telephones, 322-1012 and 327-5892 by use of leased lines will be on the premises or property of the New England Telephone Company.

(16) For the reasons given above and upon the facts sworn to, it is hereby respectfully requested that this Court issue a Wire Tap Warrant authorizing Officer JOHN C. O'MALLEY to intercept the wire communications of MARY and MILLY running to and from telephones numbered 323-1012 and 327-5892 at 28 Meyers Street, Roslindale, the date of said interception by Warrant to commence upon installation of the intercepting device in conformance to Section 99, I.A. 2 of Chapter 272.

Respectfully Submitted,
GARRETT H. BYRNE,
DISTRICT ATTORNEY,

By his specially designated Assistant District Attorney,
ROBERT SNIDER,
Assistant District Attorney.

Then appeared before me the said ROBERT SNIDER and being duly sworn, made oath that the above statements are true.

Dated this 10th day of May, 1972 at Boston, Massachusetts.

REUBEN L. LURIE.

SUFFOLK, ss: SUPERIOR COURT

AFFIDAVIT.

I, JOHN C. O'MALLEY, Detective, Boston Police Department assigned to the Suffolk County District Attorney's Office, being duly sworn, state:

1. That on April 24, 1972, I appeared before REUBEN L. LURIE, Judge of the Massachusetts Superior Court, Suffolk County and submitted and swore to an affidavit, a copy of which is attached hereto and marked "C". I respectfully request that said Affidavit marked "C" be, by reference, made a part hereof for all purposes including my oath made on this date.

2. Pursuant to the Wiretap Warrant, dated April 24, 1972, marked "D", on April 25, 1972 an intercepting device was installed and commenced interceptions and recording of communications at 11:00 a.m. on the telephone numbered 327-5527, located in Suite 2 at 102 Cass Street, West Roxbury. In excess of 300 communications were intercepted from 11:00 a.m. to 7:30 p.m. on the following dates: April 25, 26, 27, 28, and 29; May 1, 2, and 3, 1972. The great majority of said intercepted communications concern violations of Mass. General Laws, Chapter 271, Section 17 and the conspiracy to violate the same.

3. As a result of said interceptions and recordings, conducted by myself and other Detectives of the Suffolk County District Attorney's Staff, it was established that FRED VITELLO spoke over his telephone (327-5527) to, among others, a woman, who is called and identifies herself as "MILLY", seven or eight times each day on either of two telephones; 323-1012 or 327-5892. Both telephones are listed in the records of the New England Telephone Company to "WILLIAM P. WEST, 28 Meyer Street, Roslin-

dale, Mass." and are located at 28 Meyer Street. The January 1971 Voter Listing Book lists Anna Stark (formerly of 43 Jewett Street) and PAUL F. and JEAN VITELLO as the occupants of 28 Meyer Street. The 1972 Cole's Dictionary lists the occupants of 28 Meyer Street as ANNA STARK and WILLIAM P. WEST, Contractor. On April 25, 1972, FRED VITELLO called MILLY at 323-1012 four times and received one call from her and in all of said calls, Number Play and Horse Play was discussed and taken and the results of Horse Play was asked for by FRED and given by MILLY. I can hear, during MILLY's calls, another female called "MARY" answering another telephone at MILLY's location. In several calls FRED and MILLY discuss "FRANK" and "The Boss" and "My Brother". It is my opinion, based upon my surveillances and these conversations, that "FRANK" is FRANK VITELLO. In one call on the 25th., FRED told MILLY to have "HENRY" pick up any messages for him. It is my opinion, based upon my surveillances and these conversations that "HENRY" is HENRY F. TANZI.

On April 26, 1972, at 1:30 p.m., while MILLY was conversing with FRED, I dialed 323-1012 and received a busy signal. Over our intercept I could hear MARY talking on another phone so I immediately dialed 327-5892 and received a busy signal. At about 4:40 p.m. on the same date, I repeated the same procedure and again both lines were busy. Again on the same date at 5:08 p.m. FRED dialed 323-1012 and before the phone rang he hung up and immediately dialed 327-5892. The female "MARY" answered and discussed Horses with FREDDIE. In the background I could hear MILLY talking on the other phone. MILLY's conversations with FRED dealt almost exclusively with Gaming talk.

4. Officer THOMAS O'BRIEN, the same brother Officer mentioned in the Affidavit marked "C", told me on May 2,

1972, that on May 1, 1972, at about 6:15 p.m. he was watching 28 Meyer Street, and he saw two females enter a 1971 Blue Mercury Sedan, Mass. Reg. 86117, listed in the Registry to LEON CARRESI, 28 Pinedale Road, Roslindale, and operated by a male we have seen in the Dwarf Restaurant. We have observed this same car parked almost daily in front of the Dwarf Restaurant, *4013A* Washington Street, Roslindale and we have observed the same man who was operating the car as the Manager of the Dwarf Restaurant. Our observations disclosed that when TANZI made his pick-up at the Dwarf, the Restaurant was shortly thereafter closed and the same operator got in the car and left. PAUL MATTHEWS, Mass. State Police, told me that while they were following FRANK VITELLO, he stopped at the Dwarf every day. I have observed FRANK stop at the Dwarf on more than five occasions and I noticed that his visits coincided with those of TANZI.

5. I spoke with Special Agent DENNIS CONDON, F.B.I. Organized Crime Section and liason to State and Local Law Enforcement Agencies within the last two days and he told me that a garage at 6 Organ Park, Roslindale had been raided for Gaming Violations in 1963. Although telephones FA3-2237, 2238 and 2239 were listed there to a fictitious company, "T & T Construction Company", only one phone was found. (The owner of the garage, JOHN B. TANZI, denied knowledge of the use of the garage as he said he rented it out). The Officers searched the garage and found phone wires running underground from the garage to the premises at 28 Meyer Street, where four (4) phones were found: FA5-0454, FA3-7836, FA3-2913, and FA3-1012, one of the phones MILLY is now using. The occupant of 28 Meyer Street at that time was the father of FRANK VITELLO.

6. MILLY's conversations with FRED, which I have heard, generally consist of MILLY giving FRED "heavy"

Number Play (Example: call #236 on April 29, 1972; MILLY gave FRED 0230 - 1 and 1; 118 - $4.00; 1788 $1 and 3; 1200 - $1 and 3, 1287 - $1 and 3, 1651 - $1 and 2; 1656 - $1 and 1; 210 - $3.50; 2169 - $8.50) and MILLY's giving FRED the number for the day and the results of the Horse Races at various tracks, such as Suffolk Downs, Narragansett, "Gardens", Hialeah, Pimlico and Big A. The fact that MILLY gives the Race results to FRED indicates to me, to Detective JOHN F. DOYLE, and to the other Officers in the District Attorney's Office, that MILLY receives such results from a "wire service", that is an organization which provides to illegal Bookmakers, wagering information and fast and sure results of Horse Races without which illegal Horse Play could not be taken. On May 2, 1972 during one of MILLY's conversations with FRED, she states that the service has moved out but she has the new number. It is my opinion and the opinion of the other Officers, that the identification and apprehension of those involved in the Wire Service, is necessary to the discovery and stopping of the continued violations of Mass. General Laws, Chapter 271, Section 17, and the elimination of those involved in the conspiracy to violate the same whether they be street agents or those who organized, and control such conspiracy, and reap the profits thereof. The "Wire Service" usually services many individual Bookmaking operations and therefore, when it is shut down by Law Enforcement, all the Bookmakers who relied upon it are also forced to shut down. Illegal Bookmakers cannot rely upon legal sources of information, such as Race Track results printed in newspapers because the information is too slow. In order to run their operations, they need to learn the results of Horse Races very shortly after the running of each race so that winners may be paid off and so that their customers may know how to bet a later race. In addition, the wire service

may be used by the Bookmakers to "lay-off" bets; i.e., to have larger Bookies take part or all of some bets so that the risk of paying off a big winner is spread around several persons, a necessary service to a Bookmaker. In times past, I have been told by other Law Enforcement Officers involved in the investigation of Gaming, when the wire service was closed down, all the Bookmakers serviced by that wire service closed down.

7. The neighborhood in the vicinity of 28 Meyers Street is residential, consisting mostly of persons who have been there for some time. It is extremely unlikely, probably impossible, to find a location at which to install an interception in the vicinity of 28 Meyers Street itself. Given the caution displayed by the persons under surveillance, our activity would be spotted. A location has been secured, however, in the same exchange and so that it will not be necessary to make a secret entry upon a private place and premises in order to install an intercepting device or recording equipment and the point from which to install the intercepts on said two telephones, 323-1012 and 327-5892 by use of leased lines, will be on the premises of the New England Telephone Company.

8. Physical surveillance, the use of informants, or other types of normal investigation would be fruitless in combatting this conspiracy since "MILLY" and "MARY" seem to do nearly all of their dealing up and down the hierarchy of the conspiracy via telephone, and describe many persons with code names, such as "A7".

Respectfully Submitted,
JOHN C. O'MALLEY, Detective,
Boston Police Department.

The appeared before me the said JOHN C. O'MALLEY, and being duly sworn, made oath that the above statements are true,

Dated this 10th day of May 1972 at Boston, Massachusetts.

REUBEN LURIE,
Suffolk Superior Court.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS: SUPERIOR COURT.

SUFFOLK TO WIT:

TO THE DISTRICT ATTORNEY FOR THE COUNTY OF SUFFOLK, HIS SPECIALLY DESIGNATED ASSISTANT DISTRICT ATTORNEY, AND HIS DESIGNATED INVESTIGATIVE AND LAW ENFORCEMENT OFFICERS:

GREETING:

Whereas, application in writing under oath, supported by Affidavits, has been made before me this day, the subscriber hereto, REUBEN L. LURIE, a Justice of the Superior Court of the Commonwealth, for an order authorizing and directing the interception of wire communications pursuant to Mass. General Laws, Chapter 272, Section 99; complaining that two females, "MILLY" and "MARY", a more complete description being unknown to the Commonwealth at this time, who are now working at 28 Meyer Street, Roslindale section of the City of Boston and using two telephones located therein, 323-1012 and 327-5892, in order to violate Mass. General Laws, Chapter 271, Section 17 and to conspire to violate the same; have conducted, are conducting, and will continue to conduct from said 28 Meyer Street, criminal activities connected with a continuing conspiracy by means of a highly organized and disciplined organization to engage in supplying illegal goods and services, namely; violation of Section 17, Mass. General Laws, Chapter 271, contrary to the laws of this Common-

wealth, and that they communicate by means of the telephones between and among themselves in furtherance of such conspiracy, that these communications are made by MARY and MILLY to FRED VITELLO, to a Wire Service and to diverse individuals named in the attached Affidavits and amongst and between any or all of them, and any other person or persons unknown concerning unlawful Gaming by means of the telephone instruments located on the above described premises at 28 Meyer Street, and that said instruments 323-1012 and 327-5892 are of this date both listed to WILLIAM P. WEST as subscriber at said address according to the records of the New England Telephone and Telegraph Company, and used by said MILLY and MARY and other diverse individuals and persons unknown at this time who send and receive wire communications concerning unlawful Gaming and violations of Section 17 of Mass. General Laws, Chapter 271, and conspire to violate the same.

Whereas the application for authority to intercept the wire communications as aforesaid complies with the provisions, purposes and procedures of Section 99, Chapter 272, Mass. General Laws, as Amended, and finding probable cause supportive of these presents, WE COMMAND you and each of you forthwith, with necessary and proper systems to INTERCEPT any communications transmitted over, from, and to the telephone instrument of WILLIAM P. WEST, located at 28 Meyers Street, Roslindale section of Boston, Massachusetts, and to tap and make connections with any and all wires leading to the telephone instruments as of this date numbered 323-1012 and 327-5892, with a purpose to obtain evidence of the unlawful activities of MARY, MILLY, FRED VITELLO, FRANK VITELLO and other persons as described in the Affidavit submitted with said application and a person or persons unknown at this time concerning Unlawful Gaming and violations of Section 17, Mass. General Laws,

Chapter 271, and to aid in the apprehension and discovery of the persons herein named and their unknown confederates in crime, and that such interception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein because the Application alleges, and it is found as a fact that good cause, special important facts, and exigent circumstances exist to require the postponement of service of a copy of the within warrant until after the expiration of this and related investigations, but not later than three (3) years thereafter, and that the evidence obtained by authority of these presents be dealt with according to law, and return this warrant with your doings thereon.

You are therefore authorized and directed with all necessary assistants to install leased lines for the interception of said wire communications. The leased lines used in the execution of this warrant is to consist of a private telephone line installed at a place designated by ROBERT SNIDER, specially designated Assistant District Attorney. The leased line is to be supplied by the New England Telephone & Telegraph Co. pursuant to this order and warrant.

WITNESS, my hand and seal on this date of issuance the 10th day of May, 1972.

REUBEN L. LURIE,
Suffolk Superior Court.